



Date: April 28, 1998

CASE NO.: **97 INA 314**

In the Matter of:

LAND & SEA RESTAURANT,
Employer

on behalf of

ELADO VINCENTE MICHACA,
Alien

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of ELADO VINCENTE MICHACA ("Alien") by LAND & SEA RESTAURANT, ("Employer") under § 212 (a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) ("the Act"), and regulations promulgated thereunder at 20 CFR Part 656. After the Certifying Officer ("CO") of the U.S. Department of Labor at New York, New York, denied the application, the Employer appealed pursuant to 20 CFR § 656.26.¹

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States to perform either skilled or unskilled labor may receive a visa, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. The requirements include

¹The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

the responsibility of an Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On May 18, 1995, the Employer applied for alien labor certification on behalf of the Alien to fill the position of "Seafood Chef" in the Employer's restaurant. AF 11. The position was classified under DOT Occupational Code² No. 313.361-014 as a COOK (hotel & rest.)³ The Employer described the job duties as follows:

Plan and prepare seafood dishes eg. filet of sole, salmon steak, stuffed lobster. Season and cook food. Order supplies req'd for cooking based upon consumption. Supervise two kitchen employees preparing and assisting in preparation of food.⁴

Employer's Special Requirements were two years of experience in the Job Offered. The hours were 11:00 AM to 7:00 PM in a forty hour week, with wages at \$9.37 per hour and overtime at \$14.06 per hour, as required. The Alien worked in the position at issue from March 1992 until

²Administrative notice is taken of the Dictionary of Occupational Titles, ("DOT") published by the Employment and Training Administration of the U. S. Department of Labor.

³313.361-014 **COOK (hotel & rest.)** alternate titles: cook, restaurant prepares, seasons, and cooks soups, meats, vegetables, desserts, and other foodstuffs for consumption in eating establishments: Reads menu to estimate food requirements and orders food from supplier or procures food from storage. Adjusts thermostat controls to regulate temperature of ovens, broilers, grills, roasters, and steam kettles. Measures and mixes ingredients according to recipe, using variety of kitchen utensils and equipment, such as blenders, mixers, grinders, slicers, and tenderizers, to prepare soups, salads, gravies, desserts, sauces, and casseroles. Bakes, roasts, broils, and steams meats, fish, vegetables, and other foods. Adds seasoning to foods during mixing or cooking, according to personal judgment and experience. Observes and tests foods being cooked by tasting, smelling, and piercing with fork to determine that it is cooked. Carves meats, portions food on serving plates, adds gravies and sauces, and garnishes servings to fill orders. May supervise other cooks and kitchen employees. May wash, peel, cut, and shred vegetables and fruits to prepare them for use. May butcher chickens, fish, and shellfish. May cut, trim, and bone meat prior to cooking. May bake bread, rolls, cakes, and pastry [BAKER (hotel & rest.) 313.381-010]. May price items on menu. May be designated according to meal cooked or shift worked as Cook, Dinner (hotel & rest.); Cook, Morning (hotel & rest.); or according to food item prepared as Cook, Roast (hotel & rest.); or according to method of cooking as Cook, Broiler (hotel & rest.). May substitute for and relieve or assist other cooks during emergencies or rush periods and be designated Cook, Relief (hotel & rest.). May prepare and cook meals for institutionalized patients requiring special diets and be designated Food-Service Worker (hotel & rest.). May be designated: Cook, Dessert (hotel & rest.); Cook, Fry (hotel & rest.); Cook, Night (hotel & rest.); Cook, Sauce (hotel & rest.); Cook, Soup (hotel & rest.); Cook, Special Diet (hotel & rest.); Cook, Vegetable (hotel & rest.). May oversee work of patients assigned to kitchen for work therapy purposes when working in psychiatric hospital. GOE: 05.05.17 STRENGTH: M GED: R3 M3 L3 SVP: 7 DLU: 81 Prepares food and serves restaurant patrons at counters or tables: Takes order from customer and cooks foods requiring short preparation time, according to customer requirements. Completes order from steamtable and serves customer at table or counter. Accepts payment and makes change, or writes charge slip. Carves meats, makes sandwiches, and brews coffee. May clean food preparation equipment and work area. May clean counter or tables. GOE: 05.10.08 STRENGTH: L GED: R3 M2 L2 SVP: 3 DLU: 81

⁴Quoted as amended by applicant.

the date of application. While working as Seafood Chef in the Land & Sea Restaurant in Riverdale, New York, from 1985 until he was hired by the Employer's restaurant in West Caldwell, the Alien's duties were the same as those stated *supra* in the Part 13 of the application. Of the three U. S. workers who applied for the position none was hired. AF 03-04, 34.

Notice of Findings. Subject to the Employer's rebuttal under 20 CFR § 656.25(c), the CO denied certification in the Notice of Findings ("NOF") of June 17, 1996. AF 35-38. Noting the Alien's qualifications, the CO observed that under 20 CFR § 656.21(b)(5) the Employer must establish that its hiring criteria for the position are the minimum necessary for the performance of the job, and that no worker has been hired for the position with less training and/or experience.⁵ The CO explained that the Alien represented that he acquired the qualifying experience while working in a restaurant whose name is the same as that of the Employer. As the Department of Labor files contain eight applications for alien labor certification for three restaurants that bore the same name and were represented by the same attorney, the CO said the evidence of record suggested that the Employer may have trained the Alien in the duties of this job in a separate but related restaurant notwithstanding a denial by Employer, which asserted that no "overlapping control" or "parent /subsidiary relationship" exists among them.⁶ Inferring that there appeared to be a "distinct relationship" among all of these restaurants, the CO said an explanation was required. The CO then specified the evidence needed to establish the absence of a connection among these restaurants that was germane to this case. The CO emphasized the connections between the West Caldwell and Riverdale locations, as the Alien acquired his qualifying job experience at the Land & Sea Restaurant in Riverdale.⁷

Rebuttal. The Employer's August 23, 1996, rebuttal addressed the issues stated in the NOF. AF 39-62. The Employer contended that the owners, managers and administrative functions of the restaurants of the same name at West Caldwell and Riverdale were separate and distinct, based primarily on the same evidence as it offered the CO on August 23, 1996.

The Employer said that the Fair Lawn Avenue restaurant (in Fair Lawn, New Jersey) is owned by St. Anagryoi, Inc., with control in John Anastasopoulos; the Broadway restaurant (in Fair Lawn) is owned by St. Panormitis, Inc., with control in Antonio Panterlis; the Riverdale restaurant is owned by St. Irene, Inc., with control in Kosmos Terolenos; the West Caldwell restaurant (Employer) is owned by St. Irene, Inc., with control in Kosmos Terolenos. While Employer said the Riverdale restaurant is owned by St. Taxiarchis, Inc., however, it did not

⁵The CO also cited the definition of "employment" in 20 CFR § 656.50, which has been recodified under 20 CFR § 656.3.

⁶The CO counted two Land & Sea Restaurants in Fair Lawn, New Jersey (four applications between them); Riverdale, New York (three applications); and the instant application.

⁷In the event that the Employer did not sustain its burden of proving these restaurants to be separate entities for the purposes of this regulation, Employer was directed to demonstrate that it could not train a U. S. worker with the same qualifications as those of the Alien when he was first hired by the Employer in 1985. AF 36-37.

disclose the identity of the controlling owner of that corporation, except for a bald denial of any connection. AF 60. The menus Employer submitted in rebuttal incorporated the locations of all four Land & Sea Restaurant locations in a single line on its front cover, indicating that all food items offered, prices and conditions of service were shared among them without exception. AF 55-56.

The cover pages of the 1995 tax returns for St. Irene, Inc., and St. Taxiarchis, Inc., were prepared by the same individual. While the line for signature for St Irene, Inc., showed the name of Mr. Terodemos, it was unsigned and no title was given for him. The corresponding page for the St. Taxiarchis, Inc., bore no signature or identification of the "officer" who was to sign, but the title line provided for the signature of the corporation's secretary.

Final Determination. The CO denied certification in the Final Determination issued on September 11, 1996. Noting the Employer's rebuttal, the CO observed that in spite of Employer's evidence to substantiate that the two Fair Lawn restaurants and the West Caldwell and Riverdale restaurants were separate and distinct entities with no interrelationship among them, it failed to establish that these business were unrelated and that their ownership and control did not overlap. The CO explained that the Employer's statement that the Riverdale and West Caldwell Land & Sea Restaurants were "separate legal entities with distinct managements and personnel" did not prove the absence of a relationship, common ownership, or control as between the two entities that are critical to this case.⁸ Finding it relevant that Employer failed to supply the full names of all corporate officers and restaurant managers of these found restaurants and corporations, the CO observed that the rebuttal did note that the West Caldwell and Riverdale restaurants were owned and controlled by the Employer and another corporation, but said its omission of the identities of the owners and officers of the two corporations was conspicuous.⁹ The CO then said the Articles of Incorporation or Certificates of Incorporation and the tax returns were not provided for the restaurants, even though the NOF directed that these be made part of the evidence. The CO cited the common menu to be evidence supporting the inference that the operation of the four restaurants proceeded out of a single source, regardless of form and contrary to Employer's representations. Finally, the CO observed that no evidence of record supported a finding that it was not feasible to give a U.S. worker the same training that it had given to the Alien and that the Employer did not reduce the job requirements and indicate its willingness to readvertise the job. Concluding that the Employer had failed to sustain its burden of proof, the CO denied alien labor certification.

Appeal. On August 12, 1996, the Employer moved to reconsider the CO's denial of alien labor certification and in the alternative that the Final Determination be reviewed. AF 72-74. The

⁸While the ownership and control of the Riverdale Land & Sea Restaurants are not at issue in this application, Employer's evidence established that two directors of St. Taxiarchis, Inc., and St. Panormitis, Inc., were identical.

⁹Again, while the ownership and control of two Riverdale Land & Sea Restaurants are not at issue in this application, the omissions in Employer's evidence were found in representations as to these two entities, as well.

CO denied the motion to reconsider, citing **Harry Tancredi**, 88 INA 441 (Dec. 1, 1988).

Discussion

The Employer's motion to reconsider the Final Determination disingenuously argued that its rebuttal and application supplied the evidence demanded in the NOF, and that it only withheld such items of evidence as were not germane to the disposition of this application. As the panel has mentioned in footnotes, the issue in this case turns on the identification of the owners and the officers of the corporations running the restaurants in Riverdale and West Caldwell, and the corporate owners and officers of the two Fair Lawn restaurants were peripheral. While the CO did take note of the omission of requested data as to the two Fair Lawn restaurants, this clearly was not the basis for the denial of alien labor certification. Close inspection of the rebuttal documents confirms that it was the Employer's conspicuous failure to reveal the identities of the owners and operators of the Riverdale and West Caldwell restaurants that led to the CO to draw the inferences that supported the denial of alien labor certification.

First, while Employer meticulously identified the persons who controlled St. Anagroi, Inc., St. Panormitis, Inc., and St. Irene, Inc., it pointedly failed to disclose the controlling owner of St. Taxiarchis, Inc., which operates the West Caldwell site for the Land & Sea Restaurants group. The data Employer omitted was relevant to the pivotal issue raised by the NOF, and the impact of its omission was heightened by the cover of the unified menu of the four restaurants, which listed all four locations together on a single line to indicate that they were, in fact, a single entity. This impression was confirmed by the menu's presentation of common offerings of food items at prices that were identical and subject to the identical conditions of service and availability. See AF 55-56.

Employer's second admission that the withheld information weighed against the Employer was found in the cover pages of the 1995 tax returns for St. Irene, Inc., and St. Taxiarchis, Inc., that were part of its rebuttal evidence. Not only did Employer withhold the incorporation documents that the CO had requested, but it failed to provide complete versions of these pages, as filed with the IRS, which might have disclosed the information that the CO sought. As the Employer asserted in its request for reconsideration, **GenCorp**, 87 INA 659 (1988) (*en banc*), clearly required it to submit the required germane data that it failed to disclose in either its application or its rebuttal despite the explicit, timely directions of the NOF.

While an employer may adopt any qualifications it may fancy for the workers it hires in its business, its use of restrictive job criteria is limited by 20 CFR § 656.21(b)(5) when employer applies restrictive hiring criteria to U. S. job seekers in the course of testing the labor market in support of an application for certification to hire an alien for the job at issue. 20 CFR § 656.21(b)(5) requires the employer to establish that its job qualifications for the position offered are its actual minimum requirements for the job, that it has not in the past hired workers with less training or experience to perform work similar to duties of the position at issue, and that it is not feasible to hire workers with less training or experience than is normally required by the job it now

seeks to fill. The rebuttal of the Employer in this case did not prove that the qualifications it imposed on the position that it offered were its actual minimum requirements for the job. The Employer's hiring and its lengthy retention of the Alien in this job contradicted any denial that the Alien's experience was acquired in the position at issue. It follows that because 20 CFR § 656.21(b)(5) required the Employer to show that the qualifications in its application represent its actual minimum requirements for the job, we must affirm the CO's finding that this Employer failed to establish that it is not feasible to hire a U. S. worker without the restrictive job criteria as the CO's conclusion was supported by the evidence of record.

Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

FREDERICK D. NEUSNER

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.